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DATAPREP (MALAYSIA) SDN BHD

v.

UTAS LAMBANG SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
NOOR AZIAN SHAARI J
[COMPANIES WINDING UP NO: D2-28-146-2008]
24 NOVEMBER 2008

C ***COMPANY LAW:*** *Winding up - Petition - Opposition to petition - Affidavit in reply - Delay in filing - Failure to file affidavit in reply seven days before hearing date - Whether fatal - Companies (Winding-Up) Rules 1972, r. 30(1) - Whether mandatory - Binding precedent - Practice of - Companies Act 1965, s. 218(1)(e)*

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The petition to wind up the respondent was filed on 19 February 2008 and served on the respondent on 13 March 2008. The hearing of the petition was fixed on 11 July 2008. The respondent only filed the affidavit to oppose the petition on 10 July 2008 (the date prior to the date appointed for the hearing of the petition). Under the circumstances, the respondent had breached r. 30 of the Companies (Winding-Up) Rules 1972. As such the affidavit filed could not be admitted as r.30(1) of the Companies (Winding -Up) Rule 1972 was mandatory. It was therefore deemed that the respondent had no affidavit opposing the petition and the petition should be allowed. The respondent however urged the court to consider the affidavit citing the case of *Ng Thoong Chen v. Kedah Marble Sdn Bhd* where the High Court Judge had accepted the affidavit filed less than seven days before the date appointed for the hearing of the petition.

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Held (allowing the petition):

(1) Rule 30(1) of the Companies (Winding-Up) Rules 1972 is mandatory as it incorporates the word 'shall.' The case of *Ng Thoong Chen v. Kedah Marble Sdn Bhd* was only a High Court decision while the case of *Crocuses and Daffodils (M) Sdn Bhd v. Development and Commercial Bank Bhd* was a Court of Appeal decision. This court was bound by the Court of Appeal decision due to the practice of 'binding precedent.' (para 6)

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(2) The petition should be allowed solely on the ground of no affidavit in opposition was filed. However, even if the affidavit which was filed was admitted, the respondent was in a position of not being able to pay its debts and therefore must also be wound up. The respondent's position was one of being unable to pay its debts under s. 218(1)(e) of the Companies Act 1965. (paras 11 & 12)

Case(s) referred to:
Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***
Ng Thoong Chen v. Kedah Marble Sdn Bhd [2002] 7 CLJ 59 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e)
Companies (Winding-Up) Rules 1972, r. 30(1)

For the petition - Mahathir Abdullah; M/s Raslan Loong
For the respondent - Maznah Kamaruddin; M/s Abdullah & Maznah
Official receiver - Joan Anita

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Azian Shaari J:

[1] The petition to wind-up the respondent was filed on 19 February 2008 and served on the respondent on 13 March 2008.

[2] The hearing of the petition was fixed on 11 July 2008. The respondent only filed the affidavit to oppose the petition on 10 July 2008 (being the date prior to the date appointed for the hearing of the petition).

[3] Under the circumstances, the respondent had breached r. 30 of the Companies (Winding-Up) Rules 1972 which states:

> **30 Affidavits opposing the petition and affidavits in reply**
>
> (1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

[4] As such the affidavit filed cannot be admitted as r. 30(1) of the Companies (Winding-Up) Rule 1972 is mandatory. It is therefore deemed that the respondent had no affidavit opposing the petition and the petition should be allowed. In *Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank Bhd* [1997] 3 CLJ 485 Siti Norma Yaakob JCA (as she then was) said:

> By their words and expression, r. 30(1) is **mandatory** in nature and as such the learned Judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other. (emphasis added)

[5] The respondent however urged the court to consider the affidavit citing the case of *Ng Thoong Chen v. Kedah Marble Sdn Bhd* [2002] 7 CLJ p. 59 where the High Court Judge accepted the affidavit filed less than seven (7) days before the date appointed for the hearing of the petition. It was held that:

> [1a] Nevertheless, bearing in mind such authorities *Arab Malaysian Merchant Bank v. Orient Apparel Bhd* and *Arise Enterprise Sdn Bhd v. Feiyen Sanherk Hardware Sdn Bhd*, in relation to the exercise of the court's power under r. 194 of the Rules, the court must look at all the circumstances of the case before penalizing the respondent.
>
> [2] On the facts and in the circumstances, no injustice has been caused by the defect or irregularity in question. It has also not been shown that the injustice, if any, cannot be remedied by an order of the court. This being the case, the court ought to exercise its power under s. 221 of the Act and r. 194 of the Rules in favour of the respondent and allow the affidavits to be used in the hearing of the petition on merits.

[6] I however do not agree that the affidavit filed less than seven (7) days before the time appointed for the hearing of the petition be admitted, the reasons being:

1. Rule 30(1) of the Companies (Winding-Up) Rules 1972 is mandatory as it incorporates the word "shall".

2. *Crocuses & Daffodils (M) Sdn Bhd v. Development and Commercial Bank Bhd* [1997] 3 CLJ 485 is a Court of Appeal decision;

3. *Ng Thoong Chen v. Kedah Marble Sdn Bhd* [2002] 7 CLJ 59 is only a High Court decision; and

4. I am bound by the Court of Appeal decision due to the practice of "binding precedent".

[7] However, in the interest of justice I still heard what the respondent had to say in opposition which basically can be summed up as the respondent is not liable to refund the advance made by the petitioner.

[8] The petitioner had advanced the sum of RM3,000,000 to the respondent and the parties had agreed that in the event the Ministry of The Education, Youth and Sports of the Royal Government of Cambodia fails to successfully accept the Letter of Offer of Exim Bank Berhad dated 26 July 2006 the respondent shall refund all advances.

[9] I find that in this case, the Ministry concerned had failed to accept the facility, hence the sum advanced becomes due to the petitioner. The petitioner then demanded for the amount but the respondent has since not refunded the said sum.

[10] As such the notice issued under s. 218 of the Companies Act 1965 on 25 January 2008 by the petitioner had not been complied with.

[11] Therefore, even if the affidavit which I ruled was filed out of time is admitted, the respondent's position is one of being unable to pay its debts under s. 218(1)(e) of the Companies Act 1965.

[12] Therefore the petition should be allowed solely on the ground of no affidavit in opposition was filed. However, even of the affidavit which was file is admitted, which I did not, the respondent is in a position of not being able to pay its debts and therefore must also be wound-up.